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Roman Law in American Law: Twentieth Century Cases of the Supreme Court

*Samuel J. Astorino*¹

I. INTRODUCTION

One of the most enduring problems of the legal history of the West concerns the influence of Roman law on the development and nature of subsequent legal systems. This article, following very cursory background remarks, examines cases decided roughly in the twentieth century by the United States Supreme Court in order to evaluate the manner, and extent, that that tribunal used Roman law. Legal historians who have ably chronicled the patterns of American legal development have almost totally ignored the presence of Roman doctrines in the jurisprudence of the United States. That various American lawyers in the past have been well aware of Roman law, as revealed especially by evidence of their library holdings, is a story that has come to light through the recent and remarkable efforts of scholars. That story, nevertheless, must be complemented by an inquiry into actual applications of Roman law to American case law. At this point in the research, it appears to be true that, with some possible exceptions, Roman law has not furnished the basis of precedent. In those instances where the ancient rules were employed, they were part of a much broader historical inquiry that encompassed the English legal heritage especially as well, but also numerous references to European civil law, the Napoleonic Code, and to a limited extent the *Siete Partidas*.

This last conclusion, however, may provide a slightly different understanding of the role played by Roman law in influencing American law. Roman law, together with English common law and continental civil law, furnished American jurists seeking legal pedigrees for their decisions with historical understandings. In sum, Roman law was an integral part of the larger jurisprudential process by which American jurists reached back to find a line of

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argument to be employed in understanding the case. Unsurprisingly for common law judges and lawyers who are always tethered to a sense of history through the process of amassing precedent, a view of the historical evolution of specific legal rules has been seen as essential to the determination of the outcome in particular cases. The effort here is aimed at exploring this very point: it has been the special sense of a historical background that has brought into play in American law some aspects of Roman law. That is to say that if Roman law is isolated in its role, its impact becomes almost negligible in American legal practice. On the other hand, if its role is considered in the context of a more inclusive historical analysis that employed English, canon, and civil laws as well, then Roman law looms larger as a starting point for an explanatory chain leading from the past to the present. An examination of the cases listed herein is designed to elucidate that factual background. As Roman law has specifically affected jurisprudential thought in America, the preeminent historian of this topic, Dean Michael Hoeflich, has concluded that:

There was a moment in the Anglo-American legal world when Roman and civil law exercised a particular attraction to jurists and theoreticians. This moment lasted, I suggest, roughly from the late eighteenth to early twentieth centuries.²

By 1920, the "moment" had come to an end in the United States for two reasons. First, World War I generated a broad anti-German feeling, thereby closing off a major source of civil law influence. Second, by the time of the war, there was a dramatic decline in language skills, especially Greek and Latin, among lawyers and jurists, amounting to a cultural shift towards the study of the more technical natural sciences, mathematics, and the social sciences. The "moment," however, was not totally extinguished after the war, since echoes of Roman law still lingered in the academic air. Even as to contemporary times, Dean Hoeflich has still detected a

2. M. H. HOEFLICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 142 (1997). Dean Hoeflich entitles his concluding chapter "The Domestication of Roman Law in the Anglo-American World After 1850." In further elaboration of his subject, he notes:

The thesis of this book is quite simple. Although Roman and civil law were not received into Anglo-American law during the modern era, they did in fact exercise a significant influence on the thinking of some of the most important jurists and legal theorists of the nineteenth century in the United States and thereby, did indeed play a significant role in the development of Anglo-American law and jurisprudence.

Id. at 2.

Roman law "renaissance" in the American legal academy.³

Interest and advocacy of Roman law in America continued throughout the twentieth century. The advocacy ran to various degrees of suggested influence. At one point Charles Phineas Sherman of Yale condemned the "Ignorance and prejudice" regarding the "great debt of Anglo-American law to the law of Rome and the truth that knowledge of Roman law is knowledge of our own."⁴ In 1911, he sharply attacked the case method of American legal teaching with the provocative declaration that the study of Roman law "will sooner or later destroy the present emphasis . . . as the exclusive method of teaching American law."⁵ Others, like Roscoe Pound, perceived Roman law within the context of comparative studies or even as gap fillers.⁶

Americans who were interested in how Roman law affected their own common law were intently concerned with the background of England's heritage from Rome. Because of the direct link between English and American law, they naturally searched backwards to English law to find that the genesis of Roman influence existed and then quickly leaped to the obvious assumption that their own law

3. *Id.* at 142-44; see also M. H. Hoeflich, *A Renaissance in Legal History*, 1984 U. ILL. L. REV. 507, 521 (1984).

4. CHARLES SHERMAN, *ROMAN LAW IN THE MODERN WORLD* vol. 18 (2d ed. 1922). Sherman had taught at Boston University where he founded the Law Review and at Yale where he was Law Librarian and curator of the Wheeler Collection of Roman, Canon, Continental and Latin American Law. The lengthy quotation is from his famous work, *ROMAN LAW IN THE MODERN WORLD*. The work was reviewed in the Tulane Law Review by Edward A. Bechtel who saw it as a wider study of Roman law that "will lead to a broader and more scientific making of law and administration of law in the world today." Edward A. Bechtel, *Roman Law in the Modern World*, 5 TUL. L. REV. 683, 685 (1931) (book review).

5. *Id.*

The remaining analysis of Sherman derives from his law review articles: *The Nineteenth Century Revival of Roman Law Study in England and America*, 23 THE GREEN BAG, 624-26 (1911); *Salient Features of the Reception of Roman Law Into the Common Law of England and America*, 8 B.U. L. REV. 183, 192, (1928); *How Greek Jurisprudence Helped to Form Our Modern Jurisprudence*, 11 B.U. L. REV. 364, 374-75 (1931) (the comparison to the Sermon on the Mount is reminiscent of W. W. Buckland's claim that next to Christianity, Roman law was the most important factor in shaping modern civilization). This point was noted by American writers Hessel E. Yntema, *Roman Law and Its Influence on Western Civilization*, 35 CORNELL L. REV. 77, 79 (1949) and St. John University Professor Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 451 (1961).

6. Roscoe Pound, *The Revival of Comparative Law*, 5 TUL. L. REV. 1, 12 (1930), *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161 (1934), *What May We Expect From Comparative Law*, 22 A.B.A. J. 58 (1936). Pound, of course, was very critical of a comparative approach that either simply included separate articles on subjects or that used common law methods to analyze Continental Codes. "Comparative law of this sort is worse than useless. It belongs in Mr. Dooley's category of 'dislocated law.'" *The Place of Comparative Law*, at 163.

necessarily bore the legal imprint of the ancient Romans. A survey of Volume Three of the Index to Legal Periodicals for 1898-1907, for example, reveals a surge of articles on this subject.⁷ The interest continued throughout the remainder of the century.⁸

A second source of inspiration was Germany. Here, of course, the message came in two forms. On the one hand, German legal scholarship was considered as a mode of Roman methodology in building a systematic legal structure that derived from historical analysis that would lead to a legal science. On the other hand, American legal scholars like Pound saw such "legal science" and classification as the product of distasteful German metaphysics. Instead, argued Pound, the works of Rudolph von Jhering and Eugene Ehrlich were much more suited to the emerging need in America for a law based on sociological principles and social engineering.⁹ All this was soon badly tainted by the two World

7. Examples include: Samuel Williston, *Dependency of Mutual Promises in the Civil Law*, 13 HARV. L. REV. 80 (1890); Samuel Williston, *Contracts For the Benefit of a Third Person*, 16 HARV. L. REV. 43 (1902); William Wirt Howe, *The Community of Acquests and Gains*, 12 YALE L.J. 216 (1903); Joseph H. Drake, *Consideration v. Causa in Roman-American Law*, 4 MICH. L. REV. 19 (1905); William Wirt Howe, *The Study of Roman and Civil Law*, 4 AM. L. REV. 46 (1907).

8. A. H. F. Lefroy, *Rome and Law*, 20 HARV. L. REV. 606, 617-19 (1907) (Lefroy taught at the University of Toronto); H. E. Holmes, *The Debt of the Common Law to the Civil Law*, 6 ME. L. REV. 227 (1913); A. Rives Hall, *The Common Law — Its Debt to Rome*, 5 CAN. B. REV. 639 (1927); Roscoe Pound, *The Legal Profession in England From the End of the Middle Ages to the Nineteenth Century*, 19 NOTRE DAME LAW. 315 (1944); William H. Page, *Statutes As Common Law Principles*, 1944 WIS. L. REV. 175 (1944); Ernst Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 431 (1950); see also the more recent writings: Shael Herman, *Legacy and Legend: the Continuity of Roman and English Regulation of the Jews*, 66 TUL. L. REV. 1781 (1992); Andrew Lewis, *What Marcellus Says is Against You: Roman Law and Common Law*, in *THE ROMAN LAW TRADITION*, 207 ff. (A.D.E. Lewis & D. J. Ibbetson eds. 1995). Professor Herman, cited above, discussed the debate over whether Roman law influenced English common law to any significant degree. R. H. Hemholz's *CANON LAW AND THE LAW OF ENGLAND* (1987) concludes that the contribution was significant, while the classic Frederick Pollock and Frederic W. Maitland argued that: "As to Roman Law, it led to nothing." *FREDERICK POLLOCK & FREDERIC W. MAITLAND*, 1 *THE HISTORY OF ENGLISH LAW* 122-23 (2d ed. 1899). Peter Stein concludes that in Roman law "We can find much that is relevant today" as a "basis of comparison" and "providing a stimulus for English jurisprudence." *PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 165 (1988).

9. There is a vast literature on the subject of German influence. See M. F. Hoefflich, *Transatlantic Friendships and the German Influence in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987). Mathias Reimann, *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920*, published in Berlin in 1993, contains superb surveys of this subject. See Also Michele Graziadei, *CHANGING IMAGES OF LAW IN XIX CENTURY ENGLISH LEGAL THOUGHT (THE CONTINENTAL IMPULSE)* 115-64; Mathias Reimann, *A CAREER IN ITSELF - THE GERMAN PROFESSORSHIP AS A MODEL FOR AMERICAN LEGAL ACADEMIA*, 165-202; and John Herget, *THE INFLUENCE OF GERMAN THOUGHT ON AMERICAN JURISPRUDENCE, 1880-1918*, 202-28 (1990).

Wars.¹⁰

It can be easily concluded, therefore, that, at the very least, American interest in Roman law and its particular relationship to common law theory in the United States stretched from the eighteenth century through to the present. To the committed, but small band of American Romanists, the obvious advantages of ancient rules would benefit immensely their nation's legal system in many ways. Particularly in its use as a historical tool of jurisprudence and in the widely held belief that Roman law stood for universality as trade and commerce embarked upon a more internationalist trend. In the twentieth century, the names associated with this group of advocates included scholars who were famous in their own right as the foremost students of American law in general: Pound, Samuel Williston, John Henry Wigmore, John Chipman Gray, James Brown Scott, James T. Shotwell, Munroe Smith, Hessel Yntema, and others. For one and all, it was a grave mistake to either ignore or fail to exploit the teachings of Roman law.

Scholars in the field, of course, know the above story. At the end of the academic day, however, several questions remain to be asked. Was Roman law simply an academic subject limited to legal intellectuals as a matter of theory? Did these debates in America among scholars touch upon concrete Roman legal doctrines and their discrete transformations over the centuries and over national boundaries, including the United States? More importantly, and most relevant to this article, did American courts actually employ

Also, note the early work of Rudolph Leonhard, *Kaiser Wilhelm Professor of Roman Law at Columbia University, The Vocation of America for the Science of Roman Law*, 26 HARV. L. REV. 389-415 (1913).

10. At the time of the First World War, Robert Ludlow Fowler, *The New Philosophies of Law*, 27 HARV. L. REV. 718, 723 (1914) attacked German influence. Pound responded that American law needed "ideas from without." *Id.* at 732. The Nazi attack on Roman law is covered by the following: Lawrence Preuss, *Germanic Law Versus Roman Law in National Socialist Legal History*, 16 J. COMP. LEGAL. 269-70, 274 (1934); William J. Dickman, *An Outline of Nazi Civil Law*, 15 MISS. L.J. 127, 131 (1943); Detlev Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 673-74 (1990). See also Arthur Kaufmann, *National Socialism and German Jurisprudence From 1933 to 1945*, 9 CARDOZO L. REV. 1629-49 (1988); a companion piece by Mathias Reimann, *National Socialist Jurisprudence and Academic Continuity: A Comment on Professor Kaufmann's Article*, 9 CARDOZO L. REV. 1651-62 (1988); and Gordon Ireland, *Roman and Comparative Law in the Americas After the War*, 19 TUL. L. REV. 553, 554-59 (1945). The American response to Nazi assertion that Roman law was "unGerman" and "Jewish" came from the Harvard historian C. H. McAlivain, *Our Heritage From the Law of Rome*, 19 FOREIGN AFF. 597-99, 600, 605-08 (1941). Realists were discredited as being too similar to the Nazis in legal discourse, Edward A. Purcell Jr., *THE CRISIS OF DEMOCRATIC THEORY* 176-77, 218-19 (1973).

Roman law in any of their decisions? Although his reference is to the nineteenth century, Dean Hoeflich's perceptive question could be asked of the succeeding years: "Did Roman law have a widespread influence in the United States at this time? The answer to this depends on whether or not one believes that high legal culture can have a major influence on the profession as a whole. This is not an easy question."¹¹

Legal historians generally have mapped out the influence of Roman law on modern Western legal thought.¹² But as Mathias Reimann recently reminded us, "Americans are not idealists who seek knowledge pure and simple but pragmatists who want to accomplish something with it."¹³ The "lofty and vague" abstractions of theory are suited for Europeans but not for Americans.¹⁴ This sentiment coincides with Dean Hoeflich's definition of "high culture" as "the nonpractice oriented but professional interests of the lawyer."¹⁵ Thus, R. H. Hemholz notes that while there was admiration for Roman engineering, art, and literature, "one must ask whether or not this habit of mind made any substantial difference in the development of American law."¹⁶ Was civil law used in the United States only for legal education, systematic thinking and scholarly adornment, as argued by Dean Hoeflich and Peter Stein who maintained that Roman law made no headway in the courtroom as a working component of American jurisprudence? Hemholz's view is that all "conclusions must be guarded."¹⁷ It is an "undisputable fact" that by statistical comparisons, civil law "was not used with anything remotely approaching the frequency of use of the English common law."¹⁸

11. M. H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1743 (1992).

12. ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (1991); REINHARD ZIMMERMAN, *THE LAW OF OBLIGATION: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITIONS* (1990); PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980).

13. Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its own Agenda*, 46 AM. J. COMP. L. 637, 643 (1998).

14. *Id.*

15. M. H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1743 (1992).

16. R. H. Hemholz, *Use of Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1650-84 (1992). See also R.H. Hemholz, *Continental Law and Common Law: Historical Strangers or Companions?* 1990 DUKE L.J. 1207 (1990).

17. *Id.*

18. Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403-34 (1966). See also the numerous writings by Dean Hoeflich. Additionally, note the conclusion of Kermir L. Hall that "[t]he civil law tradition contributed only modestly to the origins of American Law." KERMIR L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY*

Any proper response to these assertions obviously must derive from ransacking cases — in this article, those of the twentieth century and for the moment limited to the Supreme Court of the United States. The task of ferreting out actual references to “Roman law” has been immensely simplified by merely putting the term through the computer. The computer search for Supreme Court cases turned up 140 case references between 1788 and 1999. The present writing goes back only to the 1890’s. There are several hundred more cases in the inferior federal courts for the same period. While this article does not address state cases, the computer still has signified a very large number of cases for these state jurisdictions, as for example for the author’s home state of Pennsylvania. If these cases are in turn *Shepardized* with other states, the number of references rises considerably.

All this is to suggest that a great deal of tedious research remains to be done by legal historians in this field. Unlike general departments of history, most legal academics in law schools are not blessed with numbers of graduate students who can be put to the task of basic research. Yet, because of the case-bound nature of American law, there is no alternative to detailed readings of cases in an effort to match references to Roman law with court decisions. Moreover, the only effective way of testing the real applications of Roman law, thereby understanding its acceptance, is to follow the same path of inquiry.

Nor is this approach totally new as to this time. In 1934, James Mackintosh published a book that studied actual cases employing Roman Law.¹⁹ Four years later, William L. Burdick, Dean of the University of Kansas Law School, published the *PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW*.²⁰ Burdick’s volume was filled with references to Roman rules in American common law cases. It must be noted, however, that Dean Burdick never claimed that Roman law was binding precedent; he argued instead that American courts had adopted Roman law via English feudal law. Additionally, it is equally tantalizing to wonder how other common law countries utilized Roman law in their court decisions.

103 (1989).

19. JAMES MACKINTOSH, *ROMAN LAW IN MODERN PERSPECTIVE* (1934).

20. Wm. W. Gaunt, Inc., of Holmes Beach, Florida, reprinted Burdick’s book in 1989. See also Robert A. Kessler, *On the Value of Roman Law for Twentieth Century American Law Students*, 12 J. LEGAL EDUC. 377-95 (1960). Kansas, along with Louisiana, still tested on Roman law on their bar examinations into the twentieth century. The bar admission rules are in West Publishing Co. 1909.

In Canada, for example, the Supreme Court in 1928 relied on a long line of common law precedents and the Digest to decide unanimously that the British North America Act (1867) did not mean "women" as "persons" eligible to serve in the Senate of Canada. The decision was overruled in 1930.²¹

In this article, the presentation of the cases follows a slightly modified chronological approach. Afterwards, there is an analysis of the meanings that may be gathered from the cases.

II. CASES

In 1999, the United States Supreme Court handed down its decision in *Alden v. Maine*.²² The issue was whether state sovereign immunity barred private suits under the Fair Labor Standards Act of 1938.²³ Under Article I of the Federal Constitution, does Congress have the authority to abrogate a state's immunity from suits in its own courts? Writing for the majority, in a case of first impression, holding that a state is not immune,²⁴ Justice William Kennedy's opinion is an extended examination of the nature of the American Union. It is indeed a virtual history of the Constitution, including references to English legal history, Blackstone, Madison, Federalist No. 33, the meanings of the Tenth and Eleventh Amendments, and a number of federal cases as precedent. In dissent, Justice David Souter determined that the "Court's principal rationale for today's result, then, turns on history."²⁵ The dissent then also proceeded to engage in a review of the subject of natural law and sovereign immunity, with inquiries on Bracton, Pufendorf, Blackstone, Jean Bodin, Hobbes, and Sir John Eliot. Justice Souter, however, additionally cited to Baldus de Ubaldis and his commentary on the statute of Digna Vox in the Digest and, as well, quoted Ulpian's famous statement in the Digest that the emperor is not bound by statutes.²⁶

In assessing the relationship between civil and American

21. See, M. M. Goldsmith, *Republican Liberty Considered*, 21 HIST. POL. THOUGHT, 544 n.4; see also the concept of usufruct: "so familiar in Roman law," was first used by the Canadian Supreme Court in *St. Catherine's Milling and Lumber Co. v. The Queen* [1887] 13 S.C.R. 577, 604 (Can.).

22. 527 U.S. 706 (1999).

23. *Id.* at 712.

24. *Id.*

25. *Id.* at 763 (Souter, J., dissenting).

26. *Id.* at 768 (Souter, J., dissenting).

common law in this case, it appears that the latter would have been sufficient as a matter of precedent to decide the opinions. It is equally clear, however, that both jurists, but especially Justice Souter, was reaching for a broader wellspring of legal understanding that would bring to bear on this thinking a sense of Western historical development and integrity.

Decided in 1998, Justice John Paul Stevens wrote the majority opinion in *Miller v. Albright*,²⁷ holding that persons born in the United States, including illegitimate children, are citizens.²⁸ The dissent by Justice Steven Breyer insisted that citizenship was acquired principally by parentage.²⁹ Although the dissent followed American case law in the main, Justice Breyer included a very short reference to the basis of acquiring citizenship under Roman law principally by parentage.³⁰ The vast remainder of the dissent, of course, was based on American law that alone could have decided the matter.

In *Burnham v. Superior Court of California*,³¹ the issue involved the Due Process Clause where a non-resident was personally served with process while temporarily in California on a suit unrelated to his activities in the state.³² The only reference in Justice White's concurrence to Roman law was a footnote to L. Wenger, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE*, to the effect that under the ancient republic's rules, jurisdiction could be acquired by force.³³ Justice White was attempting to offer historical comparisons on the subject with the full knowledge that the Roman method of acquiring jurisdiction had disappeared in early nineteenth century American law.

Justice William Brennan's concurring opinion devoted a lengthy three-page analysis of English law. The two concurrences, in effect, ran the historical continuum between Rome, through England, and to American cases that formed the bulk of the precedent in the case.

The issue addressed for the majority by Justice Antonin Scalia in

27. 523 U.S. 420 (1998).

28. *Id.* at 442-43.

29. *Id.* at 476-77 (Breyer, J., dissenting).

30. *Id.* at 477 (Breyer, J., dissenting) (citing E. de Vattel, *THE LAW OF NATIONS* 101-02 (J. Chitty, trans. 1883) (1758), and A. Berger, 43 *ENCYCLOPEDIA OF ROMAN LAW* 389 (1953)).

31. 495 U.S. 604 (1990).

32. *Id.* at 607.

33. *Id.* at 631 n.3 (White, J., concurring).

Coy v. Iowa,³⁴ was whether the Sixth Amendment dictates a face-to-face cross-examinations of child victims in molestation cases.³⁵ In holding that such a requirement is found the Constitution, Justice Scalia relied almost exclusively on American law with a surprisingly brief comment on English law. As to Roman law, however, he cited Christian scripture:

There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."³⁶

In *Library of Congress v. Shaw*,³⁷ the problem was sovereign immunity and the "no interest rule": no recovery can be had "against the Government in the absence of an express waiver of sovereign immunity from an award of interest."³⁸ Justice Harry Blackmun held for the government based on American precedent. The only foreign law reference was the statement that the "institution of interest under Roman law was a penalty due from a debtor who delayed or defaulted in repayment of a loan."³⁹

The case of *Bowers v. Hardwick*⁴⁰ held that the Constitution does not extend a fundamental right to homosexuals to engage in sodomy.⁴¹ With a brief review of English law, Chief Justice Warren Burger's concurring opinion made reference to the Theodosian and Justinian Codes to claim, "[h]omosexual sodomy was a capital crime under Roman law."⁴² In dissent, Justice Harry Blackmun pointedly replied that Judeo-Christian prohibitions are insufficient as rules of law because they cannot give a state a right to impose conformity as a secular coercive power.⁴³ In the aggregate, however, the decision rested on American precedent.

In *Hughes v. Oklahoma*,⁴⁴ Justice William Brennan determined

34. 487 U.S. 1012 (1988).

35. *Id.* at 1014.

36. *Id.* at 1015-16 (quoting Acts 25:16).

37. 478 U.S. 310 (1986).

38. *Id.* at 311.

39. *Id.* at 315 n.2.

40. 478 U.S. 186 (1986).

41. *Id.* at 191.

42. *Id.* at 196 (Burger, C.J., concurring).

43. *Id.* at 211-12 (Blackmun, J., dissenting).

44. 441 U.S. 322 (1979).

that the Commerce Clause was violated where an Oklahoma statute prohibited the shipment to another state of minnow fish caught in Oklahoma.⁴⁵ Brennan's majority opinion overruled *Greer v. Connecticut*.⁴⁶ Dissenting, Justice Rehnquist (joined by Chief Justice Burger) insisted that *Greer*, which derived from Roman law, should be upheld.⁴⁷

The issue in *Hughes*, was the ancient state ownership doctrine of wild animals that had formed the basis of Justice Edward D. White's majority opinion in *Greer* in 1895.⁴⁸ Under that doctrine, wild animals located within a state were the common property of the state's citizens, and the state could act as a trustee exercising common ownership.⁴⁹ Taking wild animals was not commerce at all. It was precisely this nineteenth century "legal fiction" employed by *Greer* that J. Brennan was rejecting in 1979: the commerce clause should apply to all natural resources.

The earlier *Greer* case, however, is significant here because of its extensive use of Roman, English and Continental law. Justice White devoted over three pages at the beginning of the opinion to an analysis of the Digest. Three additional pages each covered Salic law, feudal law, French law, and comments on German, Italian, and Austrian rules on the subject. Blackstone and English law were covered in two pages. Coming last in the *Greer* opinion were a large number of American case citations.

It should be fully appreciated that despite time differences both *Hughes* and *Greer* were argued within the connected contexts of Roman law and the modern meaning of the Commerce Clause of the Constitution. By whatever measure, nevertheless, the interplay revealed a fascinating use of Roman law by American jurists seeking to interpret the founding document of the United States.

In the 1970's the Supreme Court handed down two opinions, both of which used the precedent of an earlier case in 1895 that cited Roman law to a rather extensive degree. The first of these cases was *Johnson v. Louisiana*,⁵⁰ where Justice Byron White's majority opinion upheld a Louisiana statute allowing for less than a unanimous jury verdict in criminal cases.⁵¹ The statute did not

45. *Id.* at 336-37.

46. 161 U.S. 519 (1895).

47. *Hughes*, 441 U.S. at 339-41 (Rehnquist J., dissenting).

48. *Id.* at 327.

49. *Id.*

50. 406 U.S. 356 (1972).

51. *Id.* at 363.

violate the Due Process and Equal Protection clauses for failing to satisfy the reasonable doubt standard.⁵² The second case was *Taylor v. Kentucky*.⁵³ Justice Lewis F. Powell authored the decision that held that a criminal court must instruct a jury on the presumption of innocence under the Due Process clause.⁵⁴

The two cases reaffirmed the much earlier decision of *Coffin v. United States*,⁵⁵ where Justice Edward White ruled that a defendant in a criminal case is presumed innocent until proven guilty.⁵⁶ The facts in *Coffin* concerned charges of bank fraud where the trial court did instruct the jury on the subject of reasonable doubt but erred in not instructing on the presumption of innocence.⁵⁷ In a decision of fifteen printed pages, about three were devoted to Roman law, with almost two additional pages referring to English common law, Fortescue, Blackstone and Hale, including brief mention of Deuteronomy, Sparta, and Athens. Justice Edward White quoted from the Digest and the views of the Emperor Julian on the subject: "If it suffices to accuse, what will become of the innocent?"⁵⁸ The rule of the Digest is that it is better to let the guilty go free than to condemn an innocent man. In Justice White's words, "[t]he rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law."⁵⁹ At the end of his opinion, Justice Edward White concluded:

Whilst Rome and the Medievalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis.⁶⁰

Justice Powell's 1978 reaffirmation in *Taylor* of the *Coffin* holding made no reference to foreign law. Neither Justice Brennan's concurrence nor the dissents by Justices Stevens and Rehnquist looked back to *Coffin's* use of Hebrew, Greek, and Roman law.

52. *Id.*

53. 436 U.S. 478 (1978).

54. *Id.* at 490.

55. 156 U.S. 432 (1895).

56. *Id.* at 453.

57. *Id.* at 450, 452-53.

58. *Id.* at 455.

59. *Id.*

60. *Johnson*, 406 U.S. at 460.

Justice White, however, concluded that the use of Hebrew, Greek and Roman law "suggests that the Court of the late 19th Century would have held the States bound by the reasonable-doubt standard under the Due Process Clause of the Fourteenth Amendment on the assumption that the standard was essential to a civilized system of criminal procedure."⁶¹ These words reflected an intellectual standard by which Justice White reached into Western legal history in order to find a "civilized" principle of justice.

Justice Harry Blackmun's opinion in *Roe v. Wade*,⁶² contains a significant amount of research on the history of the Hippocratic Oath, Roman law, English common and statutory law, and an extended examination of American law. Much of the research, of course, bears on the issue of privacy. Regarding Roman law, Justice Blackmun noted that "Greek and Roman law afforded little protection to the unborn" as evidenced by "Rome's prevailing free-abortion practices."⁶³ Neither dissents by Justices White and Rehnquist strayed from the corpus of strictly American law.

In *Labine v. Vincent*,⁶⁴ the issue was whether a Louisiana statute, which barred illegitimate children from sharing in the father's estate where the father had publicly acknowledged the child but had died intestate, violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁵ Justice Black's majority opinion decided that the state statute did not offend the Constitution.⁶⁶ Reference to Roman law was limited to a brief notation in Justice Brennan's dissent, noting that those countries that had received the Roman law, like Louisiana, had special rules on the father's place and power in the family.⁶⁷

Parker v. Ellis,⁶⁸ was a per curiam opinion in which the Court dismissed Petitioner's writ of habeas corpus for want of jurisdiction after the case became moot.⁶⁹ Chief Justice Warren's dissenting opinion would have granted Petitioner relief against wrongful detention based squarely on American law.⁷⁰ The Chief Justice also referred to the Magna Carta, and further concluded that habeas

61. *Id.* at 360 n.2.

62. 410 U.S. 113 (1973).

63. *Id.* at 130.

64. 401 U.S. 532 (1971).

65. *Id.* at 533.

66. *Id.* at 539-40.

67. *Id.* at 545 (Brennan, J., dissenting).

68. 362 U.S. 574 (1960).

69. *Id.* at 576.

70. *Id.* at 582-83 (Warren, C.J., dissenting).

corpus was a rule "with an ancestry reaching back to Roman law."⁷¹

Justice Felix Frankfurter authored the majority opinion in *Bartkus v. Illinois*.⁷² The issue was whether the Due Process Clause had been violated where a defendant had been acquitted in a federal trial for bank robbery but then was tried by a state court for the same crime.⁷³ The majority ruled that no violation had occurred on the basis of both American law and earlier English decisions. Justice Hugo Black dissented. In objecting to a second trial, he underscored the fact that one of the oldest ideas in Western Civilization is a bar against trying a person twice for the same crime.⁷⁴ This statement was supported by a footnote that cited the Digest; Max Radin, *ROMAN LAW*; John Phineas Sherman, *ROMAN LAW IN THE MODERN WORLD*; Christian writers such as St. Jerome, and English jurists Bracton and Blackstone.⁷⁵

In the case of *Reid v. Covert*,⁷⁶ Claire Covert killed her husband on a United States military base in England.⁷⁷ The issue was whether the Bill of Rights applied to a military courts-martial acting on American citizens abroad.⁷⁸ Justice Hugo Black's opinion concluded that the Bill of Rights did apply in such cases.⁷⁹ The opinion, while based on numerous American cases, nevertheless analyzed English legal history during the Stuart period and pointedly referred to Lord Chief Justice Hale and Blackstone as "men who exerted considerable influence on the Founders."⁸⁰ Justice Black further reminded the Court that as to a fair trial under American laws the right "is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law."⁸¹ Quoting former Secretary of State James G. Blaine, Justice Black underscored the belief that powers granted to overseas consulars were "greater than ever the Roman law conferred on the pro-consuls of the empire, to an officer who, under the terms of the commitment of this astounding trust is practically

71. *Id.* at 583.

72. 359 U.S. 121 (1959).

73. *Id.* at 121-24.

74. *Id.* at 151 (Black, J., dissenting).

75. *Id.* at 152 n.3 (Black J., dissenting).

76. 354 U.S. 1 (1957).

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 5.

80. *Id.* at 26.

81. *Reid*, 354 U.S. at 6.

irresponsible."⁸²

The decision in *Ullman v. United States*,⁸³ upheld a contempt sentence for a person who had refused to testify before a grand jury regarding his activities in the Communist Party.⁸⁴ Justice Felix Frankfurter, relying exclusively on American law, wrote the majority opinion. Justice William O. Douglas dissented, however, referring to Beccaria's ideas on crime and punishment, and added teachings from French and English law. As for Roman law, Justice Douglas wrote that the "penalties that Roman law attached to infamy are familiar: exclusion from the army, from all public service, and from the exercise of certain public rights."⁸⁵ A prison sentence was not included in the punishment.

Justice Robert A. Jackson wrote the majority opinion in *Mullane v. Hanover Bank and Trust Co.*,⁸⁶ considering the issue of the type of notice required to be given to beneficiaries on a judicial settlement of accounts by a trustee.⁸⁷ The opinion held that personal service shall be given to known persons.⁸⁸ In his analysis, Justice Jackson included in the text a discussion of the distinctions between actions in rem and in personam in the area of substantive property law that was much different in ancient times.⁸⁹ For authority, he cited to Buckland and McNair, Roman Law and Common Law, and Burdick Principles of Roman Law and Their Relation to Modern Law.⁹⁰ There were no references in the opinion to either civil law or English law. The bulk of precedent used in the case, of course, was the law of the United States.

In *Krulewitch v. United States*,⁹¹ the issue was whether a co-conspirator's statement made after the conspiracy ended was still admissible.⁹² In the concurring opinion by Justice Robert A. Jackson, the more general issue of conspiracy was discussed. Justice Jackson wrote that conspiracy was not favored by civil law countries as well as England and had been invented by the Court

82. *Id.* at 11 n.16.

83. 350 U.S. 422 (1956).

84. *Id.* at 429, 439.

85. *Id.* at 451 (Douglas, J., dissenting).

86. 339 U.S. 306 (1950).

87. *Id.* at 307.

88. *Id.* at 318.

89. *Id.* at 312.

90. *Id.*

91. 336 U.S. 440 (1949).

92. *Id.* at 441-42.

of the Star Chamber.⁹³ In a footnote, Justice Jackson noted that conspiracy "is utterly unknown to the Roman law; it is not found in modern Continental codes."⁹⁴

Justice William O. Douglas wrote for the majority in *Deputy v. du Pont*.⁹⁵ The Supreme Court here, however, rejected rather than utilized a Roman rule. The chief issue was an interpretation regarding stockholder's income under the Revenue Act of 1928 and the specific meaning of the words "interest" and "indebtedness."⁹⁶ Justice Douglas rejected the respondent's argument as being based on "some esoteric concept derived from subtle and theoretic analysis."⁹⁷ Du Pont, in fact, had used the Roman concept of the *mutuum* culled from Ledlie Sohm, *INSTITUTES OF ROMAN LAW*, to make his point.⁹⁸ Justice Douglas rejected this ancient view in favor of well-known contemporary meanings.⁹⁹

In 1937, Justice Benjamin Cardozo authored the majority opinion in *Palko v. Connecticut*,¹⁰⁰ which held there was no violation of the Fourteenth Amendment when a state takes an appeal in criminal cases where a statute permits a judge to allow the appeal.¹⁰¹ The decision revolved around American law, but Justice Cardozo's third footnote referred to Bentham on punishment and noted that compulsory self-incrimination was the established procedure in Europe, as found in Sherman, *ROMAN LAW IN THE MODERN WORLD*, and French sources as well.¹⁰²

In the same year, Justice Cardozo also wrote the opinion in *Van Beeck v. Sabine Towing Co.*,¹⁰³ but on this opinion made greater use of Roman law. The facts of the case concerned a seaman who had been killed because of his employer's negligence.¹⁰⁴ The seaman's mother sued for damages but died during the pendency of her suit.¹⁰⁵ The issue was whether the executrix's suit abated or continued after her death.¹⁰⁶ Justice Cardozo first turned to Roman

93. *Id.* at 450 (Jackson, J., concurring).

94. *Id.* at 450 n.14 (Jackson, J., concurring).

95. 308 U.S. 488 (1940).

96. *Id.* at 498.

97. *Id.* (quoting *Old Colony R. Co. v. Comm'r*, 284 U.S. 552, 561 (1932)).

98. *Id.* at 498 n.10.

99. *Id.* at 498.

100. 302 U.S. 319 (1937).

101. *Id.* at 320-21, 328.

102. *Id.* at 326 n.3.

103. 300 U.S. 342 (1937).

104. *Id.* at 343.

105. *Id.*

106. *Id.*

law where he found the principle that "no action of an essentially penal character could be commenced after the death of the person responsible for the injury."¹⁰⁷ According to the Digest, vengeance was not "to reach beyond the grave."¹⁰⁸

Here is an instance of how the Supreme Court traced the changes in Roman law by the common law. Justice Cordozo had gleaned his analysis from such English historians as Fifoot and Holdsworth.¹⁰⁹

In *Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island, and Pacific Ry. Co.*,¹¹⁰ Justice George Sutherland undertook an extensive historical inquiry into the origins of American bankruptcy law in addressing the issue of how to reorganize an insolvent interstate railroad. His only reference to Roman law was the observation that the bankruptcy law in force in England, at the time the Constitution was adopted in America, actually originated in the Roman law.¹¹¹ No citations were listed for this point.

Justice Pierce Butler wrote for the majority in *Pobreslo v. Joseph M. Boyd Co.*,¹¹² where the issue was whether voluntary assignments for the benefit of creditors was consistent with a federal statute, the Bankruptcy Act of 1933.¹¹³ Counsel for appellant referred to Max Radin's HANDBOOK OF ROMAN LAW to argue that the Romans impounded a debtor's property, provided for equitable distribution among creditors, and imposed penalties for fraud by the debtor but had no provision for discharge as found in modern legal systems. Nevertheless, the Roman doctrine was not discussed in the text of the case, which focused on a broader discussion of bankruptcy. The outcome of the case, in reality, was rooted directly in American law that alone resolved the issues.

In his various careers, Oliver Wendell Holmes made references to Roman law in several instances. Holmes, of course, was unique among all of the justices who have served on the state and federal supreme courts in that he was by far the most knowledgeable student of Roman law. In the early 1870's, when Holmes first

107. *Id.* at 344-45, 345 n.4 (citing W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW, and BUCKLAND AND MCNAIR, ROMAN AND COMMON LAW).

108. *Van Beeck*, 300 U.S. at 345 n.5.

109. *Id.* at 345 nn.4-6, 8, 10-11.

110. 294 U.S. 648 (1935).

111. *Id.* at 674.

112. 287 U.S. 518 (1933).

113. *Id.* at 521.

delved into legal history, he became deeply interested in Roman law. He quickly came to question the value of the study of Roman law for American practitioners because he believed that whereas the common law, Teutonic in origin, begins and ends with particular cases, the civil law followed general principles, and he feared contamination by the latter. American law students should not study Ulpian but rather better study in a law office. What repelled Holmes in a special way was the Germanic influence in Roman law based on the Hegelian and Kantian presuppositions reflected by German Pandectenwissenschaft. As applied to American legal scholarship, Holmes was also directing his ire at the dean of the Harvard Law School, Christopher Columbus Langdell, who "represents the powers of darkness."¹¹⁴

According to Mark DeWolfe Howe, these views had been formed in the 1870's. In 1897, however, Holmes published his famous essay, "The Path of the Law" where he noted that as a young man he had been given "unreal" advice "and among the unrealities I place the recommendation to study the Roman law."¹¹⁵ If the advice simply meant to collect Latin maxims "to ornament the discourse," that was understandable. Otherwise, there was little value to be gained from a Roman legal system that had degenerated into philosophical and scientific generalities that bore little relationship to practical everyday "felt necessities."¹¹⁶

Still, Holmes did not hesitate to employ Roman law throughout his careers as a private practitioner, state court judge, and member of the United States Supreme Court. In 1877 he appeared as

114. The basic analysis of Holmes' views of Roman law that has been followed by subsequent writers is MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES; VOL. II: THE PROVING YEARS, 1870-1882, 92-93, 151, 157 (1963); see also Mathias Reimann, *Holmes' Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES 72 (Robert W. Gordon ed., 1992); Michele Graziadei, *Changing Images of the Law in XIX Century English Legal Thought*, in MATHIAS REIMANN, THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 150 n.179 (1993); JOHN HERGET, AMERICAN JURISPRUDENCE, 1870-1970, 42 (1990).

115. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 475 (1897).

116. *Id.* Among Holmes' numerous contributions to the American Law Review in the 1870's was an article entitled "Codes, and the Arrangement of the Law" in which he traced the legal history from Roman times of the disqualification of "deaf and dumb" persons from making contracts. Holmes took note of the fact that between Justinian's Institutes and English text writers, the rule had been misinterpreted. Holmes took away from this the warning that a developing rule can be properly understood only by "knowing the course of its development." Oliver Wendell Holmes, *Codes, and the Arrangement of the Law* 5 AM. L. REV. 1 (1870); this story is related in LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 212-13 (1991). Baker concludes: "He had no doubts about the role of historical forces in legal development." *Id.* at 212.

attorney for the defense in *Temple v. Turner*,¹¹⁷ a case involving a question of agency where a seaman had sued the master of a ship rather than the owners for wages.¹¹⁸ Holmes argued at the outset that there was no evidence the plaintiff had even served on the vessel.¹¹⁹ As to the agency issue, Holmes' argument to the trial court began with a paragraph from the Digest seeking to define *mandatum* as to whether the master of a vessel binds the owner to a contract, followed by an analysis of agency in medieval law.¹²⁰ Holmes was, in fact, tracing the history of agency principles.

As a member of the Supreme Judicial Court of Massachusetts, Holmes continued to refer to ancient rules. In 1891 he again addressed principles of agency in *Dempsey v. Chambers*.¹²¹ A delivery of coal had been made to a homeowner.¹²² The delivery somehow had been made without the knowledge or authorization of the coal company, but the deliveryman negligently broke one of the homeowner's windows.¹²³ When the coal company later learned of the shipment of its coal, it demanded payment from the homeowner who then in turn sued the coal company on an agency theory for the cost of the broken window.¹²⁴ The issue was whether the coal company was liable because it had ratified the delivery by sending a bill.¹²⁵

Holmes reached back to the Digest and principle of *ratio habito mandato comparatur* (ratification is equal to command) and found the company liable for the trespass.¹²⁶ The demand for payment was a ratification that made the master answerable. Holmes added, as usual, an analysis of English law found in Lord Coke's Institutes.¹²⁷ Once again, Holmes showed his mastery of legal history by tracing Roman legal doctrine through its meaning in English common law and application to an American problem.

In the 1899 case of *Aslanian v. Dostumian*,¹²⁸ Holmes made a very cursory inquiry into the question of whether Roman or

117. 123 Mass. 125 (1877).

118. *Id.* at 128.

119. *Id.* at 125.

120. *Id.*

121. 28 N.E. 279 (Mass. 1891).

122. *Id.* at 331.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Dempsey*, 28 N.E. at 333.

127. *Id.*

128. 54 N.E. 845 (Mass. 1899).

Frankish law applied to a debt on a draft payable in Turkey.¹²⁹ Very little was said about Roman law. In 1890, Holmes wrote the majority opinion in *Harmon v. Osgood*,¹³⁰ on the issue of whether a creditor could reach a decedent's assets willed to a trustee as a *donatio causa mortis*.¹³¹ Holmes strung together Massachusetts's statutory law, American common law, as well as Roman law to hold that an action could lie against a trustee. The reference to Roman law was again brief and devoid of almost any further comment.

After he succeeded to the United States Supreme Court, Holmes almost totally ignored Roman law. The one major exception was the subject of determining title to land gained by accretion when the flow of water receded. He first addressed this problem in writing for the majority in the case of *Ker & Co. v. Couden*,¹³² which originated in the Philippine Islands. The petitioner's argument was that under the Justinian Code, accretions from the sea belong to the owners of the bank. Holmes agreed that under a rule of Gaius, the land indeed went to that owner. But he quickly added: "If this is to be taken as an example illustrating a general principle there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*." ¹³³ By contrast, argued Holmes, a gloss of Accursius would lead to a different result. "And to illustrate a little further the uncertainty as to the Roman doctrine," Donellus held that "the Institutes [are] peculiar to rivers."¹³⁴ Holmes then turned to the Code Napoleon, the Philippine civil Code, the Civil Codes of Chile and Louisiana, and finally the Spanish Law of Waters to hold that the land belongs to the sovereign.¹³⁵

The issue reappeared in *Stevens v. Arnold*.¹³⁶ Writing for the majority, Holmes rested his decision on the prior ruling in *Ker*.¹³⁷ Once again, nevertheless, he undertook an analysis of Roman law

129. *Id.* at 846.

130. 24 N.E. 401 (Mass. 1890).

131. *Id.* at 502.

132. 223 U.S. 268 (1912).

133. *Id.* at 276.

134. *Id.* at 276-77.

135. *Id.* at 277-79. Gaius lived in the second century A.D. and his Institutes chronicled much of Roman law; Hugo Doneau (Donellus, 1527-1591) was a teacher and writer on Roman law and the French University of Bourges. Accursius taught at the University of Bologna in the thirteenth century as part of the "Glossators."

136. 262 U.S. 266 (1923).

137. *Id.* at 270.

and subsequent civil law to demonstrate his mastery of the intricacies that marked the development and differing applications of the ancient laws of Rome.

The other major reference by Justice Holmes to Roman sources was his majority opinion in *Ubarri v. Laborde*.¹³⁸ The case dealt with the laws of Puerto Rico where the question was whether an heir who waived the benefit of an inventory could make him personally liable for the debts of the succession without limits.¹³⁹ Holmes appears to have relied rather heavily on Roman law, which taught that the effect of the waiver was indeed to make the heir personally liable without limit.¹⁴⁰ To support his historical analysis, Holmes noted that the same result would obtain under English law (Glanville) as well as French law.¹⁴¹ Beyond *Ker*, *Stevens*, and *Ubarri*, Justice Holmes did nothing else with Roman law.¹⁴²

The subject of riparian rights was decided in the case of *Cubbins v. Mississippi River Commission*.¹⁴³ The specific issue was whether an owner of a riverbank could interrupt the natural flow of water.¹⁴⁴ The majority opinion by Chief Justice Edward D. White was intriguing in that over three pages were devoted to an analysis of Roman law, general European law, and the Code Napoleon. Under Roman law, the flow could not be interrupted except in cases of extraordinary floods or accidents.¹⁴⁵ The Roman law was further examined as the basis of French and Scottish laws on this subject.¹⁴⁶ Although very few American cases were cited, it does appear in the final analysis that the decision preventing the interruption of the natural flow was based on American cases. Without doubt, in any case, the decision demonstrated the use of historical inquiry in deciding law.

Justice James Clark McReynolds wrote for a unanimous court in *Butler v. Perry*,¹⁴⁷ upholding a Florida statute that required all able-bodied men to work for six days each year without pay to

138. 214 U.S. 168 (1909).

139. *Id.* at 172-73.

140. *Id.* at 172.

141. *Id.*

142. In *Bianchi v. Morales*, 262 U.S. 170, 171 (1923), Holmes made a brief reference to the laws of those nations "that inherit Roman law." In *Humphrey v. Tutman*, 198 U.S. 91, 93 (1905) Holmes referred very briefly to a maxim of Gaius, "Bonorum emptor ficto se herede agit."

143. 241 U.S. 351 (1916).

144. *Id.* at 360-61.

145. *Id.* at 363.

146. *Id.* at 365-66.

147. 240 U.S. 328 (1916).

repair roads and bridges in their own counties.¹⁴⁸ The decision rested mainly on American cases, but also traced the law of such obligation from Roman law to Blackstone where it was known as the *trinoda necessitas*.¹⁴⁹

The case of *Langpre v. Diaz*,¹⁵⁰ came out of Puerto Rico and decided that a person who purchases a minor's property by private agreement is a possessor in bad faith.¹⁵¹ In reaching his decision, Chief Justice Edward White undertook an examination of the historical roots of Puerto Rican law. This in turn involved a discussion of over three pages of Spanish law and the Code Napoleon, leading to the conclusion that the latter had been highly influenced by the writings perhaps the greatest Roman lawyer, Mucius Quintus Scaevola (d. 82 B.C.).¹⁵² The comparatively long historical inquiry into foreign law leaves a clear impression that Chief Justice White was not only cognizant of this background, but also gave it some weight in reaching his understanding of the law of the case.

In *Weems v. United States*,¹⁵³ the majority opinion of Justice Joseph McKenna dealt with the recurring issue of cruel and unusual punishment where a fifteen-year sentence was meted out for falsification of a government document.¹⁵⁴ While the sentence was set aside, the dissent of Justice Edward White condemned Roman punishment by comparison: "By the roman law a parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper, and an ape, and cast into the sea."¹⁵⁵ Justice White thereby was making one of many comparisons demonstrating cruel and unusual punishment.

The issue of whether Puerto Rico could exercise jurisdiction over a claim of property by the Roman Catholic Church was decided by the majority opinion of Chief Justice Melville W. Fuller in *Ponce v. Roman Catholic Apostolic Church*.¹⁵⁶ The case is interesting in that very few American cases were cited. Instead, the opinion was a tour around the history of the Church, including papal bulls, in Spain and the Indies. Several references were made to ancient

148. *Id.* at 329-30, 333.

149. *Id.* at 331.

150. 237 U.S. 512 (1915).

151. *Id.* at 527-28.

152. *Id.* at 524.

153. 217 U.S. 349 (1910).

154. *Id.* at 357-59.

155. *Id.* at 406 (White, J., dissenting).

156. 210 U.S. 296 (1908).

Spanish law and the writings of Pollock and Maitland on English ecclesiastical law. The opinion pointed out that according to the Justinian Code, the Emperor Constantine bestowed a corporate personality on Church property.¹⁵⁷ Under the "axiom of the heathen Papinian," the local churches succeeded to the sanctity that ancient law had given to temples.¹⁵⁸ Church ground remained hallowed after destruction of the temples. Puerto Rico, therefore, had no jurisdiction in these cases.

The case of *Romeu v. Todd*¹⁵⁹ dealt with the issue of a bona fide purchaser in a suit brought to change the recorded title over to the name of the real owner.¹⁶⁰ In characterizing the action, Justice Edward White wrote that "[i]n the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory (The *Actio Pauliana* of the Roman law), but was an action to unmask a simulation."¹⁶¹

In a case out of Pennsylvania, *Cunnius v. Reading School District*,¹⁶² the Supreme Court dealt with an interpretation of the Fourteenth Amendment on the issue of the reasonableness of a state statute that provided for the administration of assets of an absentee presumed to be dead.¹⁶³ Written by Justice Edward White, the case referred to a small number of American state cases. On the other hand, the opinion freely cited to the Code Napoleon, the writings of Domat, and Roman law. It may be accurate to conclude that the civil law sources were the key to the decision. In employing Roman law, White's opinion stated:

Whilst it may be that under the Roman law there was no complete and coherent system provided for the administration of the estate of an absentee . . . it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a curator to protect and administer an estate.¹⁶⁴

Justice White also made a brief reference to Roman law and the Code Napoleon in *City of San Juan v. St. Johns Gas Co.*,¹⁶⁵ holding

157. *Id.* at 311.

158. *Id.* at 312.

159. 206 U.S. 358 (1907).

160. *Id.* at 361-62.

161. *Id.* at 367.

162. 198 U.S. 458 (1905).

163. *Id.* at 467-68.

164. *Id.* at 469-70.

165. 195 U.S. 510 (1904).

that the character of money (greenbacks or gold) for purposes of contract law, absent an agreement, is determined by the character current at the time of performance, not at the time of the making of the agreement.¹⁶⁶ The rule, well known in American case law, ultimately derived from the Roman law.¹⁶⁷

At the turn of the twentieth century, the Supreme Court, with Justice Joseph McKenna authoring the opinions, took up the issue of adverse possession in the state of New Mexico. The first case was *United States v. Chavez*.¹⁶⁸ The specific problem was whether Mexican law contained the rule of adverse possession prior to the cession of 1848 and, thus, whether the rule carried over to statehood.¹⁶⁹ Chavez held that the principle of adverse possession came from "general jurisprudence, and is recognized in the Roman law and the codes founded thereon."¹⁷⁰ While the opinion referred to a very few American cases, Roman law appears to have been the basic principle directing the conclusion. *Chavez* was then used as the precedent in *United States v. Pendell*,¹⁷¹ although in this instance the court rested its opinion to a large degree on American cases that had been developed.

Justice Edward D. White's opinion in *Knowlton v. Moore*¹⁷² was an insightful survey of Western legal history on the subject of death taxes. It covered ancient French law, ancient German law, and nearly two pages on English law. As to Roman law, the court concluded that "[death] taxes so considered were known to the Roman law and the ancient law of the continent of Europe."¹⁷³ Despite the use of historical sources, however, the case was firmly rooted on American precedents.

Another interesting example of the way in which the Supreme Court relied mainly on Roman law is *Oakes v. United States*.¹⁷⁴ The case concerned the Federal confiscation of a steamboat owned by a Confederate during the American Civil War.¹⁷⁵ The vessel had been converted to a gunboat.¹⁷⁶ Under a special act of Congress,

166. *Id.* at 520.

167. *Id.* at 521.

168. 175 U.S. 509 (1899).

169. *Id.* at 520.

170. *Id.* at 523.

171. 185 U.S. 189 (1902).

172. 178 U.S. 41 (1900).

173. *Id.* at 47.

174. 174 U.S. 778 (1899).

175. *Id.* at 786.

176. *Id.*

July 28, 1892, Oakes sought compensation in the Court of Claims to which Congress had given jurisdiction to hear such cases.¹⁷⁷ In an opinion by Justice Horace Gray, the Supreme Court, although referring to a few American cases, drew its conclusion that Oakes had to be compensated on the basis of the Roman *jus postliminii*.¹⁷⁸ The Roman rule held that things taken by the enemy had to be restored to the former owner when he again comes under the power of the nation where he had been a citizen or subject.¹⁷⁹ The law derived from the Roman view that it was the duty of a sovereign to protect citizens and their property.¹⁸⁰ In further analysis, Justice Gray traced the rule to Vattel's work on international law and the English Prize Acts.¹⁸¹

With similar emphasis on Roman law, Justice Edward D. White held in a case of title to land gained from the Mexican cession, *Hayes v. United States*,¹⁸² that the Spanish law of the Siete Partidas, the Code Napoleon, and the Louisiana Code all derived from Roman law.¹⁸³ In this particular case, Roman law held that a person who lacked title could not convey title even by prescription.¹⁸⁴ Quoting from Roman legal history, Justice White concluded that while Roman authorities often differed on various subjects, they all agreed that void title is no title.¹⁸⁵

Justice Horace Gray wrote the controlling opinion in *United States v. Wong Kim Ark*,¹⁸⁶ deciding that under the Fourteenth Amendment, a child born in the United States of non-citizen parents is a citizen of the United States.¹⁸⁷ In support of his conclusion, Justice Gray undertook a five-page analysis of English common law, especially Blackstone, as a basis of understanding the American Constitution. He also utilized several American and French cases but added a discussion of the Roman law principle that, to the contrary, adhered to *jus sanguinis* (citizenship followed the country of descent or blood rather than *jus soli*, the

177. *Id.* at 785.

178. *Id.* at 793.

179. *Oakes*, 174 U.S. at 792.

180. *Id.* at 792-93.

181. *Id.*

182. 170 U.S. 637 (1898).

183. *Id.* at 649-50.

184. *Id.* at 650.

185. *Id.* at 651.

186. 169 U.S. 649 (1898).

187. *Id.* at 702.

country of birth).¹⁸⁸ Justice Gray noted, however, that English law did not follow the Roman rule at the time of the adoption of the Constitution in 1789.¹⁸⁹

III. PRELIMINARY CONCLUSIONS

Based on the above survey, several very preliminary conclusions follow the American Supreme Court's writings about Roman law in the twentieth century. First, in the period of approximately one hundred years, such references have appeared in an admittedly small number of cases. Compared to the total number of decisions handed down by the Court, the use of Roman legal sources has been infrequent.

Second, despite the infrequency of use, the nature and quality of these references raises intriguing questions for the legal historian who, in the final analysis, must confront the problem of what in the world are justices of the Supreme Court doing by referencing the ancient rules as well as histories of Roman law in their decisions. In some sense, of course, it may be argued that such usage merely affirmed Holmes' observation that the purpose was pure ornamentation. This view could be read in to those cases where Roman law was a mere appendage to a much broader marshalling of American decisions. On the other hand, in some instances, it is clear that the opinions seemed to be reaching for Roman law as a possible accumulation of authority, or even as gap fillers, or indeed as precedent in rare cases involving the lands acquired by expansion, particularly from the Philippines and Puerto Rico, where it was necessary to decide the content of legal rules in effect at the time of conquest. And then there is the somewhat strange analyses of Holmes himself whose opinions in *Ker*, *Stevens*, and *Ubarri* were based to a large extent on Roman law, in contrast to his fussy strictures about using the ancient rules.

Third, in attempting to respond to the question of why certain justices used Roman law, on the other hand, it is important to understand that a reading of these opinions inevitably generates a feeling that the justices perhaps were engaged in a search for historical pedigree, if not historical precedent, in some cases. The

188. *Id.* at 666.

189. *Id.*

magnetic pull of historical imprimatur seems to have convinced them to inform their conclusions with a sense of legal feel for the Western legal tradition. Seen in this light, perhaps it is not unreasonable to find these decisions sprinkled with references to the names of modern historians of the Roman legal system: Sherman, Max Radin, Buckland, McNair, Pound and others.

Donald R. Kelley reminds us in regard to the "juriconsults" that:

They spoke (and still speak) to one another over many centuries and across national boundaries, invoking not only their intellectual forebearers but also their posterity — not only their "pre-cursors," but also their "post cursors." From the Greek orators and Roman *honoratiores* to modern legal and social "scientists," certain assumptions, terms, concepts, authorities, "prejudices," and larger intellectual conventions have been preserved, developed, and modified in various ways which must be understood beyond, as well as within, specific historical contexts.¹⁹⁰

Alan Watson's latest expanded study of legal evolution underscores two additional important facets of the evolutionary tradition:

First, the weight of authority of a foreign system has come to be the course that is to be turned to in time of need. Even if the law is unclear and inappropriate, even if the system is seldom expressly referred to, still it is there. Second, the impact of the past on present law is enormous even when past law has changed its influence continues.¹⁹¹

In Watson's view, there is another universal trait in the development of law, borrowing law from other sources is often the most fruitful method by which law develops.¹⁹² In sum, according to these scholars, jurists speak to each other across the ages, while subsequent legal changes derive from borrowing the past.

Is the sample of cases compiled here so thin that such broad generalizations cannot be tested with any sense of accuracy regarding the Court's use of legal history in its decisions? That clearly seems to be the case, since at most the opinions may be no more than suggestive at this point regarding the historical value of

190. DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 6 (1990).

191. ALAN WATSON, *THE EVOLUTION OF WESTERN PRIVATE LAW* (2001).

192. *Id.* at xii.

Roman law to the Court. Further research in nineteenth century Supreme Court opinions will uncover many more Roman citations, for example, in the famous decisions of *Ex parte Milligan*,¹⁹³ *Scott v. Sandford*,¹⁹⁴ *Sturges v. Crowninshield*,¹⁹⁵ and *McCulloch v. Maryland*.¹⁹⁶

Numerous federal circuit court opinions in these two centuries offer fertile ground for further research into the use of Roman law, with additional references to the more recent works of H. F. Jolowicz, Watson,¹⁹⁷ and Barry Nicholas.¹⁹⁸ There may be at least hundreds of state cases, moreover, that to some degree include Roman legal sources. Taken in the aggregate, the opinions of all American courts using Roman law probably would far surpass present suspicions about their existence and perhaps lead to new evaluations concerning the influence of Roman jurisprudence on American legal doctrines. The small band of American legal academics that preached the gospel of such influence surely would have been pleased with such information, if only they had had a computer filled by Lexis and Westlaw.

193. 71 U.S. 2 (1866).

194. 60 U.S. 393 (1856).

195. 17 U.S. 122 (1819).

196. 17 U.S. 316 (1819).

197. See *In re Hill*, 981 F. 2d 1474 (5th Cir. 1993).

198. See *United States v. Morgan*, 51 F.3d 1105 (2d Cir. 1995); *Metz v. United Techs. Corp.*, 754 F. 2d 63 (2d Cir. 1985).